

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue, Room 217
Rockville, Maryland 20850
(240) 777-6600

www.montgomerycountymd.gov/content/council/boa.asp

Case No. S-2571 [A-5910]

**PETITION OF BRIAN R. PERRY AND SUSIE PERRY-TJAN
[NEW HOLDER: HALEH SAFAIPOUR]**

RESOLUTION TO TRANSFER SPECIAL EXCEPTION

(Resolution Adopted February 18, 2004)
(Effective Date of Resolution: March 9, 2004)

The Board of Appeals received a letter, dated January 29, 2004, from Haleh Safaipour. Ms. Safaipour is the current owner of the subject property and requests transfer of the captioned special exception to herself. She encloses a copy of the deed conveying the property to her, and states that she will operate the special exception according to the terms and conditions by which it was granted. The Board of Appeals granted Case No. S-2571 [A-5910] to Brian R. Perry and Susie Perry Tjan on November 17, 2003, to permit an accessory apartment.

The subject property is Lot 29 and 30, Block PB29, West Friendship Subdivision, located at 5331 Willard Avenue, Chevy Chase, Maryland, 20815, in the R-60 Zone.

The Board of Appeals considered Ms. Safaipour's request at its Worksession on February 18, 2004. Rule 12.2 of the Board of Appeals Rules of Procedure [Resolution No. 12-865, October 27, 1992] provides that the transfer of a special exception is a modification under Section 59-G-1.3 of the Zoning Ordinance. Section 59-G-1.3(c)(1) of Ordinance provides:

If the proposed modification is such that the terms or conditions could be modified without substantially changing the nature, character or intensity of the use and without substantially changing the effect on traffic or on the immediate neighborhood, the board, without convening a public hearing to consider the proposed change, may modify the term or condition.

The Board finds that the transfer of the special exception from one holder to another, to be operated in accordance with the terms and conditions under which it was originally granted, will not intensify the use or substantially change its impact on the immediate neighborhood or on traffic. Therefore, on a motion by Donna L. Barron seconded by Allison Ishihara Fultz, with Louise L. Mayer, Angelo M. Caputo and Donald H. Spence, Jr., Chairman in agreement:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the record in Case No. S-2571, Petition of Brian Perry and Susie Perry-Tjan, is re-opened to receive Haleh Safaipour's letter of January 29, 2004; and

BE IT FURTHER RESOLVED by the Board of Appeals for Montgomery County, Maryland that the request to transfer the special exception to Haleh Safaipour is **granted**; and

BE IT FURTHER RESOLVED by the Board of Appeals for Montgomery County, Maryland that all terms and conditions of the original special exception, except as modified by the Board of Appeals, remain in effect.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 9th day of March, 2004.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any party may, within fifteen (15) days of the date of the Board's Resolution, request a public hearing on the particular action taken by the Board. Such

request shall be in writing, and shall specify the reasons for the request and the nature of the objections and/or relief desired. In the event that such request is received, the Board shall suspend its decision and conduct a public hearing to consider the action taken.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

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Case No. S-2571 [A-5910]

PETITION OF BRIAN R. PERRY AND SUSIE PERRY-TJAN

OPINION OF THE BOARD

(Public Hearing Date: October 15, 2003)

(Effective Date of Opinion: November 17, 2003)

Case No. S-2571 is an application for a special exception pursuant to Section 59-G-2.00 (Accessory Apartment) of the Zoning Ordinance to permit an existing accessory apartment. Case No. A-5910 is an application for a variance from the required twenty five (25) foot front lot line setback.

The subject property is Lot 29 and 30, Block PB29, West Friendship Subdivision, located at 5331 Willard Avenue, Chevy Chase, Maryland, 20815, in the R-60 Zone

The Board of Appeals held a hearing on the case on October 15, 2003. Brian Perry and Susie Perry Tjan appeared in support of the application. Kevin Martell, Housing Code Field Supervisor, Montgomery County Department of Housing and Community Affairs also appeared. The Board received no testimony or evidence in opposition to the application.

EVIDENCE PRESENTED

1. Brian Perry and Susie Perry Tjan, owners of the subject property, request a special exception to use an apartment in the basement of their house as an accessory apartment.
2. Maryland National Capital Park and Planning Commission (MNCPPC) staff analyzed the application, and recommends approval, with conditions [Exhibit No. 16]. Staff found that due to a public taking of right of way width along Willard Avenue, the subject property, together with all the other homes on the southwestern portion of Willard Avenue, is a legal nonconforming lot, as it does not meet the required front-yard setback. Staff recommended that in order to

comply with Section 590G-2.00(c)(1), the applicants should apply for a variance from that standard, which they promptly did. Staff found that in all other respects, the application meets the general and specific requirements of the Zoning Ordinance for accessory apartments.

Staff defined the neighborhood of the application as: a) Willard Avenue Park on the northern quadrant of the intersection of Willard Avenue and River Road, behind the single-family houses on the northern side of Willard; b) the single-family housing fronting Willard Avenue on the southwestern part of Willard Avenue, and c) the single-family houses on the northwest side of Baltimore Avenue between River Road on the west and the GEICO property on the east. Staff found no other special exceptions in this neighborhood. In the broader area, staff includes other properties fronting Willard Avenue on its eastern portion, including the GEICO property, which has a special exception for parking associated with it.

Staff finds that the application is consistent with the Bethesda-Chevy Chase Master Plan (April 1990), which endorses “expanding choices of housing types by provision of accessory apartments” (at page 31).

Staff finds that three to five off-street parking spaces are available in a paved parking area, and that the accessory apartment will not reduce the safety of pedestrian or vehicular traffic.

Staff further finds that the subject property is served by adequate public facilities, and that the application meets all development standards for the R-60 zone and all general and specific standards for the grant of special exceptions for accessory apartments. Staff notes that the accessory apartment is located in part of the basement of the house, that it is subordinate in size to the main dwelling, and that its entrance is located at the left side of the house, down a flight of stairs, and screened by fencing, which maintains the single-family, residential appearance of the house. Staff confirmed that the owners of the subject property will occupy one of the dwelling units, and will receive compensation for only one dwelling unit, and that there is no family of unrelated persons living on the lot.

3. Housing Code Field Supervisor Kevin M. Martell inspected the proposed use and prepared a report of his findings [Exhibit No. 11]. He notes two required improvements: 1) installation of an exterior light and switch that the tenant can control over the apartment entrance; and 2) installation of a kitchen-type stove. He also notes that based upon its 252 square feet of habitable space, occupancy of the apartment is limited to two persons.

4. As described above, due to a widening of Willard Avenue after Lots 29 and 30 were recorded, the existing house requires a variance of twenty-four (24) feet as it is within one (1) foot of the front lot line. The required setback is twenty-five (25) feet, in accordance with Section 59-C-1.323(a) [Exhibit No. 6 in Case No. A-5910].

5. The accessory apartment is located in a portion of the basement of the house [Exhibit Nos. 3, 8(a), 16, 20].
6. The applicants have stated that the property owners will reside in one of the dwelling units [Exhibit No. 16].
7. The subject property, which includes Part of Lot 29 and Part of Lot 30, comprises 6,355 square feet.
8. The house was built in 1945 or 1946 and Mr. and Mrs. Perry have owned it since 1998. [Exhibit Nos. 16 and 20].
9. No exterior modifications are proposed.
10. The accessory apartment contains a large living/sleeping area, kitchen and bathroom [Exhibit No. 3, and Floor Plan appended to Exhibit No. 16].
11. The accessory apartment has the same address as the house and as a separate entrance at the side of the house, which is below grade and screened by a fence [Exhibit Nos. 8(a), 16 and 20].
12. Three to five off-street parking spaces are available. [Exhibit Nos. 3, 8(c), 20].

FINDINGS OF THE BOARD

GENERAL STANDARDS

Sec. 59-G-1.2. Conditions for granting a special exception.

59-G-1.2.1. Standard for evaluation. A special exception must not be granted absent the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with the inherent effects, are a sufficient basis to deny a special exception.

The physical and operational characteristics necessarily associated with an accessory apartment include: the existence of the apartment as a separate entity from the main living unit, but sharing a party wall with the main unit; the provision within the apartment of the necessary facilities and spaces and floor area to qualify as a habitable space under the Building Code; provision of a separate entrance and walkway, and sufficient lighting; additional activity from that household, including more use of the outdoor space and more pedestrian and automobile traffic and parking activity; and the potential for additional noise from the additional household.

The accessory apartment in the instant application is subordinate to the main dwelling, has a well-screened separate entrance which maintains the single family appearance of the house, and at least three off-street parking spaces.

The Board finds that none of the physical or operational characteristics of the proposed accessory apartment exceed what would be expected with the use. The Board finds that there will be no non-inherent adverse effects from this proposed accessory apartment.

59-G-1.21. General Conditions.

(a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) *Is a permissible special exception in the zone.*

Accessory apartments are permitted by special exception in the R-60 Zone.

(2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

As discussed below, the proposed apartment, with the variance granted by the Board, so complies.

(3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the*

Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

The Board adopts MNCPPC staff's finding that the application is consistent with the Bethesda-Chevy Chase Master Plan [See Evidence Presented, paragraph 3].

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

No new structures are proposed. The entrance to the apartment is at the side of the house, screened from view by a fence. Occupancy of the apartment is limited to two persons and ample off-street parking is available. Thus the Board finds that the single family appearance of the house is maintained and the impacts of the apartment will be minimal.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Because of its low impact on surrounding properties, the Board finds that it will not be detrimental to the use or peaceful enjoyment of surrounding properties.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The apartment will generate very little activity, and at most will have a residential style light at its entrance, which will be screened by its location below grade and behind a fence.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are*

consistent with the recommendation of a master or sector plan do not alter the nature of an area.

As discussed above [Evidence Presented, paragraph 3], MNCPPC staff found no other special exceptions in the immediate neighborhood of the subject property.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The proposed accessory apartment will have none of these effects.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer public roads, storm drainage and other public facilities.*
 - (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception.*

The Board adopts MNCPPC technical staff's finding of adequate public facilities. [Evidence Presented, paragraph 3].

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

The Board adopts MNCPPC staff's finding that the proposed accessory apartment will have no detrimental effect on vehicular or pedestrian safety. [Evidence Presented, paragraph 3].

Sec. 59-G-2.00. Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) Dwelling unit requirements:

- (1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.*

Only one accessory apartment is requested.

- (2) The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:*

- (i) The lot is 2 acres or more in size; and*
- (ii) The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

The requested accessory apartment is located in the basement of the house and shares a party wall in common with it.

- (3) An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

Not applicable.

- (4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.*

The house was constructed in 1945 or 1946 and is thus at least 58 years old.

- (5) The accessory apartment must not be located on a lot:*

- (i) That is occupied by a family of unrelated persons; or*

- (ii) *Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) *That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

The applicants confirmed to MNCPPC technical staff and in testimony that none of these conditions exists at the subject property.

- (6) *Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.*

The entrance to the accessory apartment is at the side of the house, below grade, and screened from view by a fence.

- (7) *All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.*

Not applicable.

- (8) *The accessory apartment must have the same street address (house number) as the main dwelling.*

The accessory apartment has the same address as the house.

- (9) *The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.*

The accessory apartment occupies a portion of the basement of the house and is therefore, clearly subordinate to the house. It contains approximately 252 square feet of habitable space.

(b) Ownership requirements:

- (1) *The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.*

The applicants confirmed to MNCPPC technical staff and in testimony that the owner of the subject property will occupy one of the dwelling units.

- (2) *Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the applicant, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.*

The applicants have owned the subject property since 1998.

- (3) *Under no circumstances is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

The applicants confirmed to MNCPPC staff and in testimony that the owner of the subject property will receive compensation for only one dwelling unit.

- (4) *For purposes of this section, "owner" means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the board.*

The applicants are the owners of the subject property as evidenced by the deed they submitted into the record. [Exhibit No. 19].

- (5) *The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.*

Not applicable.

(c) Land use requirements:

- (1) *The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.*

The subject property comprises 6355 square feet.

- (2) *An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in an*

excessive concentration of similar uses in the general neighborhood of the proposed use (see also Section 59-G-1.21(a)(6) which concerns excessive concentration of special exceptions in general).

The Board adopts MNCPPC staff's finding that there are no other special exceptions in the immediate neighborhood of the proposed accessory apartment, and notes, that there is an existing special exception for parking on the GEICO property, which technical staff includes in its definition of the broader neighborhood.

- (3) *There shall be adequate water supply and sewage disposal systems to serve the occupants of both the accessory apartment and the main dwelling.*

The Board adopts MNCPPC technical staff's finding that the site is served by adequate public facilities.

- (4) *Adequate parking shall be provided. There must be a minimum 2 off-street parking spaces, unless the Board makes either of the following findings:*

- (i) *More spaces are required to supplement on-street parking;*
or
- (ii) *Adequate on-street parking permits fewer off-street spaces.*

Off-street parking spaces may be in a driveway but otherwise shall not be located in the yard between the front of the house and the street right-of-way line.

Three to five parking spaces are available in the off-street parking area at the side of the house.

- (5) *Accessory apartments shall not be detrimental to the use and peaceful enjoyment of surrounding properties or the general neighborhood, and shall cause no objectionable noise, traffic or other adverse impacts.*

The proposed accessory apartment will be limited to two occupants, thus generating very little activity. It is located so as to preserve the single-family appearance of the main house, and ample off-street parking serves the subject property. The Board finds that it will have very low impact overall and will therefore, neither be detrimental to the use and peaceful enjoyment of

surrounding properties or the surrounding neighborhood, nor cause objectionable noise, traffic or other adverse impacts.

The Variance

Section 59-G-3.1 Authority – BOARD OF APPEALS

Based on the petitioner's binding testimony and the evidence of record, the Board finds that the variance can be granted. The requested variance complies with the applicable standards and requirements set forth in Section 59-A-4.11(b) as follows:

- (a) By reason of exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property;*

The Board finds that the widening of Willard Avenue, after the Lots comprising the subject property were recorded, and resulting in the public taking of nearly the entire front yard, is an extraordinary situation. The Board notes that no expansion of the existing house is proposed. The requested variance simply brings the existing house into conformance with the front lot line setback.

- (b) Such variance is the minimum reasonably necessary to overcome the aforesaid exceptional conditions;*

The Board finds that the applicants have requested no more than they need to comply with the front lot line setback.

- (c) Such variance can be granted without substantial impairment to the intent, purpose and integrity of the general plan or any duly adopted and approved area master plan affecting the subject property; and*

The Board finds that the variance is requested to continue residential use of the subject property, which will not impair the purpose or integrity of the Bethesda-Chevy Chase Master Plan.

- (d) Such variance will not be detrimental to the use and enjoyment of adjoining or neighboring properties. These provisions, however, shall not permit the Board to grant any variance to any setback or yard requirements for property zoned for commercial or industrial purposes when such property abuts or immediately adjoins any property zoned for residential purposes unless such residential property is proposed for commercial or industrial use on an adopted master plan. These provisions shall not be construed to permit the Board, under the guise of a variance, to authorize a use of land not otherwise permitted.*

The Board finds that the requested variance, for the existing house, which was subject to widening of Willard Avenue and the associated taking, will not be detrimental to the use and enjoyment of adjoining or neighboring properties.

Therefore, based upon the foregoing, the Board grants the special exception subject to the following conditions:

1. Petitioners shall be bound by their testimony and exhibits of record, including, but not limited to Exhibit Nos. 3, 4, 8, and 20, and the Floor Plan appended to Exhibit No. 16] to the extent that such evidence and representations are identified in the opinion of the Board.
2. Petitioners shall submit a copy of their deed into the special exception record. [Exhibit No. 19, submitted October 24, 2003].
3. The special exception holder shall maintain off-street parking for the subject property in its current configuration on Part of Lot 29, and if parking for the subject property changes, the special exception holder must request a modification of the special exception.
4. The applicants must comply with the requirements of the Department of Housing and Community Affairs inspection report.
5. Occupancy of the accessory apartment is limited to two persons.
6. The property owners must occupy of the dwelling units on the property.
7. The property owners can receive compensation for only one dwelling unit.
8. The subject property must not contain any of the following otherwise allowable residential uses: guest room for rent, boardinghouse or registered living unit.

On a motion by Angelo M. Caputo, seconded by Allison Ishihara Fultz, with Louise L. Mayer and Donald H. Spence, Jr., Chairman in agreement and Donna L. Barron necessarily absent:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 17th day of November, 2003.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.